BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROL MOORE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,046,055
U.S.D. 501	)	
Self-Insured Respondent	)	

ORDER

Respondent requested review of the September 4, 2012, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on February 6, 2013.

APPEARANCES

George H. Pearson, III, of Topeka, Kansas, appeared for the claimant. Kendra M. Oakes, of Kansas City, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant's injury arose out of and in the course of her employment and awarded claimant a 20 percent permanent partial whole body functional disability followed by a 72.50 percent permanent partial general (work) disability.

The respondent requests review of whether claimant's alleged personal injury arose out of and in the course of her employment and the nature and extent of claimant's disability. Respondent contends claimant was on a personal errand, taking boxes to her car on her lunch break, and therefore the accident should be determined not to have arisen out of and in the course of her employment.

Claimant argues the Award should be affirmed.

The Board is asked to determine:

1. Did claimant's alleged personal injury arise out of and in the course of her employment with respondent?

2. If so, what is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT

Claimant worked for respondent as a paraprofessional with special education children. In May 2009 claimant was working at Avondale East Elementary within the district. On May 8, 2009, the school had a fund raiser garage sale. After the sale there were empty boxes on the school's stage that needed to be taken out to the trash dumpster. Claimant had a 30 minute lunch period which begins at 12:30 p.m. Claimant lives close to the school and usually runs home at lunch to let her dogs out. She would then return to work. On the day of the accident claimant had remained at work over the lunch hour because of the garage sale.

At some point, claimant had a conversation with Javier Escalante, the head janitor, about moving the boxes. Claimant testified that Javier asked her to take some boxes from the stage so that he could set up for the fifth grade graduation. Claimant agreed to do so since she had been involved in the sale. She decided to take the boxes to her car, rather than the dumpster as she was planning to move in the near future. She asked a co-worker named Melva Smith (Mel) to keep an eye on the student she was assigned to so that she could move the boxes. Claimant testified she moved the boxes at around 1:00 p.m.

Claimant picked up the boxes, taking them through the kitchen to the back door. She propped open the outside door from the kitchen, and as she turned to pick up the boxes, the wind blew the door and it struck her in the back. Claimant fell down, feeling pain in her back all the way down her right leg.

Claimant got up and took the boxes to her car. When she went back inside, she reported what happened to Mel, and was asked if she was going to go to the nurse. Claimant said no, as she thought her pain would go away.

A couple of weeks after the accident, claimant went to Mr. Palmer, the principal, and reported what had happened. Mr. Palmer testified that this conversation occurred on May 18, 2009. Claimant indicated she could continue to do her job because she was not having to lift anything. Claimant initially declined to fill out an accident report, but ultimately did because it was required by respondent. The accident report noted that the incident with the door occurred at 1:00 p.m., right after lunch, and after the kids had been taken into the gym.

Claimant stated everyone at the school took it upon themselves to help the janitor when he asked for help. She testified:

> He cleans up the school, but if one of our children throws up, we have to put the stuff down and then we call him to clean it up. If they have dirty diapers, we have to take it out to the dumpster and get rid of it so it doesn't smell up the-- you know, the room and stuff. And the garage sale, since it was me and Irene Townsend and Melva Smith and Carrie Hammeke that-- we put the garage sale on together, I felt it was my responsibility to go ahead and take those boxes out of there.[1]

Claimant stated it wouldn't have mattered if she was going to her car or the dumpster that day. She would have gone through the kitchen door either way because she was parked by the dumpster. Claimant testified the school is not very green and wastes a lot of things that could be reused. Therefore, she and Irene take it upon themselves to recycle what they can on their own. That it why she was taking the boxes home to use when she moved. After claimant filed her claim, it was denied because she was taking the boxes to her car instead of the dumpster.[2]

Claimant sought treatment with Dr. Raymond Magee, her family physician, who took x-rays and recommended she get a donut to sit on. He also gave her restrictions which are not part of this record. (The preliminary hearing exhibits were not included in this record) Claimant was seen by Zhengyu Hu, M.D., who gave her a series of injections to the facet joints and sacroiliac joint. The injections provided only temporary relief.

Claimant testified that the pain she had in her tailbone has pretty much resolved, but she still finds it hard to sit on a bench and she has trouble riding a motorcycle. She has not sought treatment for the tailbone pain since June when she saw Dr. Magee.

The fall semester of school began on August 12, 2009, and when claimant returned to work she was still under Dr. Magee's restrictions. She began working at Quincy Elementary in August 2009. Claimant testified that she did not work the summer of 2009, but was looking for work.

Claimant was fired from her job with Quincy Elementary in March 2010. She was told she was being fired for incompetence. Claimant worked for Southwest Caging from June 2010 until her surgery. Claimant has not worked since her surgery.

Claimant attributes her current symptoms of pain in the low back, buttocks on the right side and down the right leg to the May 8, 2009 accident. Claimant testified that she

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[1] P.H. Trans. at 11.

[2] P.H. Trans. at 14.

is no longer stuffing envelopes at Southwest Caging because she can no longer move back and forth repetitiously and that is what the job requires.

Melva Smith worked with claimant as a para-educator in May 2008 at Avondale. Claimant told Ms. Smith about the accident the same day. Claimant came through the door and was rubbing her back end and said that she had been hit in her back end by a door. The conversation with claimant was brief at that time because it was the children's time to learn and she didn't want to disrupt that.

Ms. Smith testified that the boxes claimant was moving were from the school garage sale. Ms. Smith testified that she has a bad back so she chose to not carry any heavy boxes, but she did take some lighter boxes to the back room. She did not hear Javier say the boxes could be taken for personal use. She agreed claimant and Javier may have had a separate conversation. She testified that Javier never asked for their help with any of his work. All she knew was that he was unhappy with the boxes on the stage because he needed the space, so they tried to be nice and help him out.

Duke Palmer, principal at Avondale East Elementary School for nine years, testified that claimant had two different periods of employment at Avondale East as a paraprofessional. He testified claimant no longer works for Avondale East as she requested a transfer. Mr. Palmer was aware that claimant was alleging an injury on May 8, 2009, while taking some boxes to her car. He was not aware of any policy prohibiting people from taking something that is going to be thrown away, for their personal use.[3] He testified that normally the two staff custodians take care of emptying the trash and breaking down and taking out any boxes that need to be disposed of. Mr. Palmer doesn't know what was said to claimant regarding the boxes, but at that time empty boxes were thrown away.

The only thing Mr. Palmer knows about claimant's incident is that the door leading to the kitchen hit her in the behind and back. He described the door as being made of metal, and fairly heavy. If it is pushed back far enough, it will stay open. The door leads to the outside and is used for food deliveries.

Mr. Palmer agreed it is permissible for a janitor to ask a paraprofessional to help get rid of boxes and if the boxes are going to be thrown away there is no policy prohibiting anyone from taking them for their own use. He acknowledged that he occasionally helped the custodians by carrying boxes to the dumpster.

The school now recycles and has purchased a bin. Any proceeds from recycling the boxes benefits the school. The preferred policy now is to recycle rather than allow employees to take things home. The school would also rather the custodians take care

[3] Palmer Depo. at 7.

of any lifting or throwing away of material. This was not the policy at the time of claimant's injury.

Mr. Palmer testified that claimant was a good employee who liked to get involved in the fund-raising activities. Mr. Palmer believed claimant came to him on May 18 to inform him about her accident and he had her fill out an accident report. He agreed claimant was reluctant to fill out an accident report, but the policy requires an accident report for any kind of injury. So claimant completed the form. The form noted the alleged accident occurred at 1:00 p.m., which is at the end of claimant's lunch break.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on September 26, 2011, for the purpose of determining causation, permanent impairment of function and permanent work restrictions. Claimant had complaints of intermittent pain across her low back at waist level with intermittent radiation down the right leg to the great toe and intermittent numbness and tingling. Claimant reported being stiff and sore when she wakes up and her pain is worsened by sitting more than standing and walking, and worsened by bending, squatting, twisting, lifting and pushing, more than pulling.[4] His history included information regarding claimant's referral to Dr. John Ciccarelli, and the resulting surgery on January 24, 2011. Claimant underwent a decompression and fusion at L4-5, resulting in partial pain relief. Claimant was found to be at maximum medical improvement (MMI) on July 26, 2011.

Dr. Prostic found claimant to have a healed midline scar in her low back with residual tenderness; some continued loss of motion and dysrhythmia, continued low back pain with straight leg raise maneuver and mild hamstring tightness.

Dr. Prostic opined claimant sustained injury to her low back during the course of her employment. He determined claimant's accident caused or contributed to claimant's disc space collapse and lateral recess stenosis. He cautioned that claimant's fusion at L4-5 was not yet solid and she needed to be on a program of aerobic exercises for flexibility and strengthening. He also opined that it is likely claimant will have episodic low back pain from degenerative disc disease at L5-S1 and will likely need conservative care in the future. He recommended intermittent heat or ice and massage and anti-inflammatory medicines by mouth. Dr. Prostic restricted claimant from lifting more than 30 pounds knee-to-shoulder and half that much frequently; cautioned claimant should avoid frequent bending or twisting at the waist, forceful pushing or puling and more than minimal use of vibrating equipment or captive positioning.[5]

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[4] Prostic Depo., Ex. 2 at 1-2 (Dr. Prostic's Sept. 26, 2011 report).

[5] Prostic Depo., Ex. 2 at 2-3 (Dr. Prostic's Sept. 26, 2011 report).

Dr. Prostic assigned claimant a 20 percent permanent partial impairment to the body as a whole on a functional basis. After reviewing the task list provided by vocational expert Richard W. Santner, Dr. Prostic found that claimant could no longer perform 10 out of 22 tasks for a 45.5 percent task loss.[6]

Claimant met with board certified orthopedic surgeon John M. Ciccarelli, M.D., and his physician's assistant, Amy Sclesky, on September 21, 2010, for an evaluation. Claimant had complaints of low back pain and bilateral lower extremity numbness. Claimant was examined and it was determined that her work accident was the prevailing factor for claimant's present symptoms of low back pain and predominant right lower extremity radiculopathy. This finding did not correspond with claimant's November 27, 2009, MRI, so an updated MRI was ordered without contrast pending approval. Claimant was also given restrictions of no loads extending 20 pounds pushing, pulling or lifting and no repetitive lifting activities.[7]

Claimant was seen again on November 11, 2010. Claimant reported continued significant beltline low back pain, and bilateral leg pain in an L5 type distribution. Upon reviewing claimant's current MRI, Dr. Ciccarelli determined claimant was suffering a marked disk space collapse and disk space narrowing with significant reactive end plate change and marked foraminal and lateral recess stenosis at L4-5. Claimant was in need of surgical decompression and fusion of the lumbar area. He continued with her prior restrictions.

Claimant had surgery January 24, 2011. She had a good result and was seen for follow-up on July 26, 2011. Claimant continued to do well with some occasional back soreness, primarily myofascial. She was released at maximum medical improvement without restrictions. On October 20, 2011, Dr. Ciccarelli rated claimant with a 20 percent permanent partial impairment to the body as a whole. No restrictions were deemed necessary and, in his opinion, claimant suffered no task loss. However, Dr. Ciccarelli testified that the lack of restrictions was partially due to claimant's desire to return to the same line of work. On cross examination, Dr. Ciccarelli acknowledged claimant would possibly fall within the medium category if weight restrictions were actually imposed on her. Although the doctor also stated that opinion would be speculation as claimant had requested restrictions not be imposed.

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[6] Prostic Depo., Ex. 3 (Dr. Prostic's Sept. 26, 2011 report).

[7] Ciccarelli Depo., Ex. 2 at 3 (Dr. Ciccarelli's Sept. 21, 2010 report).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[11]

Claimant was injured when she was struck by a metal door as she was exiting the school. Claimant had been asked to remove certain boxes from the school where she worked. Claimant removed the boxes, taking them to her car, rather than the dumpster, because she was moving. Her car was next to the dumpster. She would have exited the same door, in the same manner regardless of where she was taking the boxes. The school principal agreed it was proper for a paraprofessional to assist the janitor in this manner. Additionally, there was nothing preventing claimant from taking the boxes home for her own use. The accident occurred at a time when claimant had returned to her job duties, as she had to ask Mel to watch the child she was responsible for. The Board finds

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[8] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 2008 Supp. 44-501(a).

[11] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[12]

Both Dr. Prostic and Dr. Ciccarelli determined that claimant had suffered a 20 percent whole person functional impairment as the result of the accident on May 8, 2009. The Board awards claimant a 20 percent whole person functional impairment from this accident.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[13]

This record contains two task loss opinions. The ALJ found Dr. Prostic determined claimant's task loss to be 45 percent. Dr. Ciccarelli determined claimant had no restrictions and no task loss. However, Dr. Ciccarelli acknowledged certain of the tasks on the list would exceed his recommendations for claimant, should he be asked to provide restrictions for her. Dr. Ciccarelli also acknowledged claimants lack of restrictions was partially due to her desire to return to the same or similar work with another employer. The Board finds the opinion of Dr. Prostic to be the more persuasive in this matter regarding the actual task loss suffered by claimant as the result of this accident. The ALJ adopted Dr. Prostic's task loss opinion and the Board agrees.

The ALJ noted claimant is not working, which translates to a wage loss of 100 percent. This, when averaged with Dr. Prostic's task loss, calculates to a work disability

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[12] K.S.A. 44-510e(a).

[13] K.S.A. 44-510e.

of 72.5 percent. The Board agrees with the ALJ's determination that, with the accelerated payout of awards, the brief periods claimant was employed following her departure from respondent have no impact on the award.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent. Claimant suffered a 20 percent whole body functional impairment followed by a 72.5 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated September 4, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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